ARGUMENT

I. FIRST AMENDMENT PRINCIPLES DO NOT FAVOR A NARROWER CONSTRUCTION OF THE HOBBS ACT.

The second issue before the Court pertains to the scope of liability under subsection (a) of the Hobbs Act, which provides, in relevant part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a). Respondents advocate a "three-way" interpretation of subsection (a), under which the statute should be read as forbidding not only robbery and extortion, and attempts and conspiracies to commit those crimes, but also "threatening or committing physical violence in furtherance of a plan to 'obstruct, delay, or affect commerce.'" *Nat'l Org. for Women, Inc. v. Scheidler*, 396 F.3d 807, 812 (7th Cir. 2005) (citation and internal quotation marks omitted). Petitioners, by contrast, argue that the statute forbids acts and threats of physical violence only when committed in furtherance of a plan to obstruct, delay, or affect commerce by robbery or extortion (the "two-way" interpretation). *See id.*

As acknowledged by the court of appeals, the three way interpretation of the statute best comports with a plain reading of the statute's text and principles of statutory construction. *See id.* at 815-16. The Hobbs Act defines "robbery," in part, as "the unlawful taking or obtaining of personal property from the person . . . against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1). "Extortion," means, in part, "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(1). As the court of appeals observed: "Anyone who commits physical violence to a person or property in furtherance of a plan of robbery or extortion would almost certainly be found to have attempted one of those crimes, or, if others are involved, to have conspired to commit one or the other." *Scheidler*, 396 F.3d at 816. Thus, it is difficult to conceive of situations in which the final "physical violence" clause of subsection (a) would criminalize conduct not already proscribed under the earlier "robbery and extortion" clause in that subsection. As a result, Petitioners' unduly restrictive interpretation is contrary to the "well-worn canon of statutory interpretation under which a court should avoid making one part of a statute meaningless." *Id.*; *see also* Craig M. Bradley, *NOW v. Scheidler: RICO Meets the First Amendment*, 1994 S. Ct. Rev. 129, 143 (1994) (the two-way interpretation renders the physical violence clause "nugatory").

Petitioners argue that the Court should favor the narrower two-way interpretation of the statute, lest potential Hobbs Act liability place at risk "a wide variety of political and labor protesters." Brief for Petitioners Joseph Scheidler, Andrew Scholberg, Timothy Murphy, and the Pro-Life Action League, Inc. ("Scheidler Br."), Sept. 2, 2005, at 31.

Such "free speech" concerns are unfounded. Imposing liability for acts and threats of physical violence is particularly unlikely to burden or chill free speech. Undoubtedly, the Court's First Amendment jurisprudence affords protection to a broad array of peaceful protest activities, but it simply does not extend to protect violent conduct and threats and certainly does not shelter the sort of pervasive violent conduct reflected in the record in this case. And because the Court's precedent already requires "precision of regulation" of acts and threats of violence, protesters need not fear that they will be subject to liability for engaging in protected activity.

A. A Proscription Against Acts And Threats Of Violence Reaches Only Speech And Conduct Outside The Scope Of The First Amendment.

Freedom of speech under the First Amendment to the United States Constitution is one of the basic tenets upon which our nation was founded and represents the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In the words of the Court, "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *Claiborne Hardware Co.*, 458 U.S. at 913 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)). Among the public issues subject to this robust debate, none is more important than the debate over the contours of our civil rights, including reproductive rights.

The government may not restrict freedom of expression simply because the ideas expressed are considered offensive. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the

First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *see also Sullivan*, 376 U.S. at 271 (constitutional protections do not turn on "the truth, popularity, or social utility of the ideas and beliefs which are offered") (internal quotation marks omitted). The First Amendment demands tolerance of a certain amount of "verbal tumult, discord, and even offensive utterance," as these are "necessary side effects of the broader enduring values which the process of open debate permits us to achieve." *Cohen v. California*, 403 U.S. 15, 24-25 (1971) (overturning breach of peace conviction of anti-war protester who walked through courthouse wearing t-shirt with offensive anti-draft language). The Court has protected even speech and conduct meant to coerce "through social pressure and the 'threat' of social ostracism," and has recognized that speech on highly-charged issues often may become "vituperative, abusive, and inexact." *Claiborne Hardware*, 458 U.S. at 909, 910 n.46; *see also Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("The claim that the expressions were intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment"). However, the Court has never protected the sort of violent activity in which Petitioners engaged. *See, e.g., Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 704 (7th Cir. 2001).

It is also a fundamental precept that free speech rights guaranteed under the Constitution may be exercised most efficaciously when individuals of like opinions band together. Thus, in *Claiborne Hardware*, the Court stated:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more

> than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

458 U.S. at 908 (internal quotation marks and citation omitted). The Court has protected a broad range of activities associated with social protest, including picketing and peaceful marches and demonstrations. *See id.* at 909. Although the ideas they express may be controversial, protesters will have a defense to criminal or civil liability if they adhere to peaceful, lawful means. *See Cox v. Louisiana*, 379 U.S. 536 (1965) (breach of peace convictions reversed when civil rights demonstrations were orderly, peaceful and consisted of protected forms of expression including picketing, handing out leaflets, displaying signs, and singing songs).

"The protections afforded by the First Amendment, however, are not absolute." *Virginia v. Black*, 538 U.S. 343, 358 (2003). This Court has "long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Id.*; *see also Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) ("To be sure, our cases reject the 'view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea'") (citation omitted).

As this Court stated in *Claiborne Hardware*, "'[c]ertainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'" 458 U.S. at 916 (citing *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglass, J., concurring)); *see also Mitchell*, 508 U.S. at 484 ("a physical assault is not by any stretch of the imagination expressive conduct

protected by the First Amendment"); *Roberts v. United States Jaycees,* 468 U.S. 609, 628 (1984) ("violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection").

Likewise, the First Amendment does not shelter "true threats." *Black*, 538 U.S at 358-60. "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359; *see also Hill v. Colorado*, 530 U.S. 703, 716 (2000) (a "deliberate 'verbal or visual assault'" may justify proscription of such offensive speech) (citation omitted). "The speaker need not actually intend to carry out the threat." *Black*, 539 U.S. at 359-60. "Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Id.* at 360 (citations and internal quotation marks omitted).

Threats of violence are akin to "fighting words" and are not entitled to First Amendment protection. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic"). "[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of *expressing* whatever idea the speaker wishes to convey." *R.A.V. v. City of St. Paul, Minn.* 505 U.S. 377, 393 (1992); *see also Giboney v. Empire Storage &*

Ice Co., 336 U.S. 490, 502 (1949) (First Amendment does not protect language used to carry out illegal conduct).

An interpretation of the Hobbs Act that independently proscribes acts and threats of violence corresponds closely with categories of conduct and speech which this Court has held are unequivocally excluded from the First Amendment's protections. As a result, the three-way interpretation of the Hobbs Act Respondents advocate is particularly unlikely to sweep within the statute's prohibitions protected free speech or conduct. Petitioners' alleged concerns that protesters' free speech rights will be inhibited are therefore misplaced. Certain "gray areas" still may exist in the Court's First Amendment jurisprudence. *See, e.g., Stewart v. McCoy*, 537 U.S. 993, 995 (2002) (Stevens, J.) (statement respecting denial of *certiorari*) (the Court has "not yet considered" whether the First Amendment protects "instructional speech" (as opposed to mere advocacy) with respect to the "[l]ong range planning of criminal enterprises-which may include oral advice, training exercises, and perhaps the preparation of written materials"). But the issue of whether threats or acts of actual physical violence are protected is not a gray area. The First Amendment simply does not reach so far.

To narrowly construe the Hobbs Act and to avoid proscribing acts and threats of physical violence in the name of free speech would, in effect, turn the Court's First Amendment jurisprudence on its head. The Court, therefore, should decline Petitioners' invitation to construe the Hobbs Act narrowly out of concern for chilling protesters' freedom of expression.

B. The Court's Jurisprudence Ensures That A Proscription Against Acts And Threats Of Violence May Not Be Used To Punish Protected Conduct.

Petitioners claim that the risk to social protesters is heightened because of the broad-based nature of enterprise liability under RICO. *See* Scheidler Br. at 31. These concerns are misplaced.

It is true that individuals or groups engaged in constitutionally protected forms of social protest occasionally may cross the line between protected expression and unprotected, unlawful conduct. This Court's precedent, however, already ensures that First Amendment protections are not automatically forfeited as a result by demanding "precision of regulation" of violence or threats of violence occurring in the context of constitutionally protected activity. *Claiborne Hardware*, 458 U.S. at 916 (citation omitted). Specifically, the First Amendment "imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *Id.* at 916-17; *see also Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 263 (1994) (Souter J., concurring) (RICO defendants may raise First Amendment defense in particular cases).

The First Amendment allows liability to be imposed only for damages "proximately caused by unlawful conduct." *Claiborne Hardware*, 458 U.S. at 918. Courts strictly guard against imposing liability for the consequences of nonviolent, protected activity, while protecting society from violence or threats of violence. To punish association with a group, a plaintiff must establish the defendant's "'knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further

those illegal aims.'" *Id.* at 920 (quoting *Healy v. James*, 408 U.S. 169, 186 (1972)).

Under these strict criteria, the collective activities of a group may not give rise to liability unless violence "colored the entire collective effort." *Id.* at 933. The burden to make such a showing is high:

> Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity.

Id. at 933-34. Under *Claiborne Hardware*, sit-ins, boycotts and the other non-violent collective activities would not provide a basis for liability.

The strict criteria articulated in *Claiborne Hardware* can and should be applied rigorously, and they were in this case. Thus, the jury was instructed that: "to find the defendants liable, you must conclude that the enterprise, or those acting on behalf of the enterprise, directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives." *Scheidler*, 267 F.3d at 704. The record in this case was replete with evidence of violent threats and conduct. *See id.* at 694; Respondents' Brief in Opposition to Petitions for Writ of Certiorari, May 10, 2005, at 3-6. The evidence showed, and the jury found that Petitioners, consistent with the principles of *Claiborne Hardware*, were responsible for four acts and threats of violence. *See*

Scheidler, 267 F.3d at 695, 703. It would be fully consistent with First Amendment principles for the district court to be allowed to consider whether the four acts and threats of violence constitute a pattern of racketeering activity and warrant imposition of an appropriately tailored injunction.

II. THE COURT OF APPEALS' PRIOR HOLDING THAT RICO PROVIDES EQUITABLE REMEDIES FOR PRIVATE PLAINTIFFS IS CORRECT.

A. The Text Of The RICO Statute Plainly Authorizes Equitable Relief For Private Parties.

In the prior direct appeal, the court of appeals was asked to decide whether Congress in enacting RICO withheld from the federal courts their customary power to provide equitable relief. The court of appeals' conclusion that the statute's plain text authorizes private plaintiffs to obtain injunctive relief is sound and supported by public policy. The court of appeals' conclusion has been adopted in recent district court decisions. *See Motorola Credit Corp. v. Uzan*, 202 F. Supp. 2d 239, 243-44 (S.D.N.Y. 2002), *remanded*, 322 F.3d 130 (2d Cir. 2003) (per curiam) (directing dismissal of RICO claims as unripe); *In re Managed Care Litig.*, 298 F. Supp. 2d 1259, 1281-83 (S.D. Fla. 2003).

As the Seventh Circuit correctly stated, interpretation of the remedial provisions of the RICO statute "begins with the statute's text, and, if the text is unambiguous, . . . ends there as well." *Scheidler*, 267 F.3d at 695 (citing *Alexander v. Sandoval*, 532 U.S. 275 (2001)). Assuming *arguendo* that the text is less clear than the court of appeals believed, Petitioners cannot prevail unless Congress clearly excluded equitable relief. *See Califano v. Yamasaki*, 442 U.S. 682,

705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction"); *accord Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied"); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11-17 (1942) ("Congress would not, without clearly expressing such a purpose, deprive . . . [a court] of its customary power. . . . [D]enial of such power is not to be inferred . . . [from] silence. . . . Where Congress wished to deprive the courts of . . . historic power, it knew how to use apt words"). Absent a Congressional command to the contrary, the availability of all legal and equitable remedies should be presumed: "[I]t is . . . well settled that where legal rights have been invaded, and a federal statue provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946).

A narrow reading of RICO, moreover, is also contrary Congress' command that: "The provisions of this title shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). Thus, "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition . . . ." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985); *see also United States v. Turkette*, 452 U.S. 576, 587 (1981) (taking liberal construction clause into account in holding that the term "enterprise" should be construed broadly to include both legitimate and illegitimate enterprises).

Close examination of the text of RICO's civil remedies provision, 18 U.S.C. § 1964, yields no evidence that Congress intended to withdraw equitable jurisdiction.

> Section 1964 provides, in pertinent part, that:
>
> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders . . . .
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions . . . as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

Subsection (a) broadly empowers the federal courts to grant injunctive relief in actions brought under the RICO statute. This broad authority is not limited by the subsection's text or by legislative history to a governmental claim for relief. *See, e.g.*, H.R. REP. No. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034 ("Although certain remedies are set out, the list is not meant to be exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting

influence and make due provision for the rights of innocent persons").

Subsection (b) authorizes the Attorney General to institute proceedings "under this section" (*i.e.*, under § 1964), and specifically empowers the government to seek interim injunctive relief. Petitioner, and the United States, in its brief as *amicus curiae*, suggest that by granting the government authority under subsection (b) to bring actions "under this section," "Congress signaled its intent that the district court's equitable jurisdiction under Section 1964(a) must be invoked by the Attorney General." Brief for the United States as Amicus Curiae ("U.S. Br."), Sept. 2, 2005, at 20. This argument is untenable for at least three reasons.

First, this argument ignores private plaintiffs' right to sue under Section 1964. Subsection (c) authorizes suits by private parties and provides for recovery by a successful plaintiff of treble damages, costs, and attorney's fees and nowhere limits the availability of equitable relief.

The language of subsection (c) does not bar private plaintiffs from access to the equitable powers accorded the federal courts in subsection (a), either expressly or by a "necessary and inescapable inference." *Porter*, 328 U.S. at 398. Had Congress intended to preclude such relief to private plaintiffs, it easily could have done so. For instance, instead of providing in subsection (c) that any person injured "may sue . . . *and* shall recover threefold the damages . . . ," Congress could have provided that a plaintiff "may sue . . . *to* recover threefold the damages . . . ." *See* 18 U.S.C. § 1964(c). By changing a single word, Congress would have made clear that private plaintiffs were limited to damages, costs and fees. To the contrary, the actual language establishes that those remedies are accorded to private

plaintiffs *in addition to* the general equitable relief provided for in subsection (a).

Second, this argument overlooks the real purpose of the language in subsection (b) empowering the government to file suit "under this section." As the Seventh Circuit held in *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), the inclusion of specific authorization for government equity suits in section 1964 was intended to eliminate dispute about the scope of the Attorney General's authority to seek equitable relief. Under traditional rules of equity, the government's request for an injunction was subject to the requirement that it establish irreparable injury or inadequacy of remedy at law. Section 1964 removed these requirements:

> It was plainly the intention of Congress in adopting Section 1964 to provide for injunctive relief against violations of Section 1962 without any requirement of a showing of irreparable injury other than that injury to the public which Congress found to be inherent in the conduct made unlawful by Section 1962. It is also obvious that Congress did not intend to require a showing of inadequacy of the remedy at law.

Id. at 1358-59.

Third, Petitioners' construction creates absurd results. If authorization for injunctive relief is limited by express allowance in subsection (b) of the Attorney General to seek *preliminary* injunctive relief, then no one, not even the Attorney General, would be authorized to seek *permanent* injunctive relief which the Congress contemplated in subsection (a). Finally, as a practical matter, it defies logic that Congress would authorize private parties to recover

treble damages and costs and fees incurred because of the injury but deny them the ability to prevent the harm from occurring.

B. Public Policy Considerations Favor Allowing Private Parties To Seek Equitable Relief.

Public policy considerations support interpreting RICO to allow private parties to seek and obtain equitable relief. The United States argues in its *amicus* brief that policy considerations counsel against allowing private plaintiffs to request the "wide ranging" remedies available under RICO because such remedies should rest only in the hands of a "public authority sanctioned by the sense of public responsibility." U.S. Br. at 28; *see also* Brief for Petitioner Operation Rescue, Sept. 2, 2005, at 38 (arguing that because "private parties do not have the political accountability, or the duty to exercise prosecutorial discretion," requests for injunctive relief could be "misused"). This argument is misplaced and ignores the fact that the court is vested with the ultimate decision about whether to issue equitable relief.

Congress, in enacting the civil liability provisions of RICO, reposed its trust in private litigants, envisioning them as "private attorney generals" who would supplement the enforcement of the statute. In *Rotella v. Wood*, 528 U.S. 549, 557-58 (2000), the Court stated that "[t]he object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." (Citations omitted). As this Court has recognized, private attorney general actions perform an important function in a world of limited resources. "Private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps."

Sedima, 473 U.S. at 493; *see also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (RICO "bring[s] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in . . . RICO is the carrot of treble damages"). *Cf. Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (private attorney general statutes "provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations").

Private litigants cannot fulfill their role as "private attorneys general" unless they are able to avail themselves of the full range of equitable remedies traditionally available in the federal courts. To establish a "pattern" of racketeering, an element of a RICO claim, "a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal conduct." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Plaintiffs in civil lawsuits will not be able, in all instances, to protect themselves, and the public, from ongoing racketeering activity if they cannot obtain injunctive relief or other equitable remedies.

Even the Court in *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1088-89 (9th Cir. 1986), recognized the public policy benefits of allowing private parties to obtain equitable relief:

> [W]e recognize the force of the [plaintiff's] argument that a private injunctive remedy would permit an injured party to put an immediate stop to racketeering behavior that threatens his or her business with economic destruction before the business has been

> brought to its knees. While the treble damages remedy is a potent weapon, it necessarily assumes that economic injury has occurred. The preventive effect of injunctive relief is often a more just remedy. Although civil RICO empowers the government to bring an injunctive suit to protect a threatened enterprise, we recognize that the resources of the Unites States Attorney's office are limited. . . . 'Private attorney general provisions . . . are in part designed to fill prosecutorial gaps,' and the use of equitable remedies by private parties would frequently result in substantial benefits to society generally. These broad social benefits, such as the dismantling of an illegitimate enterprise, would generally exceed the gain to the private plaintiff from this action, especially where the individual's injury has been ameliorated by treble damages.

(Citations omitted). Thus, public policy considerations weigh in favor of allowing private parties to seek equitable relief under RICO.

The court of appeals' holding on direct appeal that the plain language of RICO's remedial provisions permits private injunctive relief is correct and is consistent with important public policy concerns.

CONCLUSION

For the foregoing reasons, the Lawyers' Committee and the NAACP respectfully submit that (1) consistent with First Amendment principles, the Hobbs Acts prohibits acts or threats of physical violence that obstruct, delay, or affect interstate commerce, and (2) the Seventh Circuit correctly concluded that RICO authorizes injunctive relief to private plaintiffs.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Amicus Brief of Life Legal Defense Foundation In Support of Petitioners

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I

Interest Of Amicus[1]

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation which provides legal assistance to pro-life advocates. LLDF was established in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience (often called "rescues") created the need for attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions under state law for trespass or blocking, sentences consisting of fines, jail time, or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

By the early 1990's, most of these pro-life advocates had turned to other, entirely lawful means of preventing abortions, including assisting women in crisis pregnancies, counseling women outside abortion facilities, and picketing, leafleting, and praying at schools, colleges, and other appropriate locations, including abortion facilities. Rather than applauding this conversion to entirely lawful forms of pro-life activism, abortion supporters have almost uniformly refused to acknowledge that there is essentially any difference between the rescue blockades of the late '80's and the completely lawful protest of the '90's to the present. They consider both to be unlawful interference with, and harassment of, women seeking abortions. The only difference is that the civil disobedience of the '80's occurred only sporadically, whereas sidewalk counselors and picketers appear weekly, sometimes daily—and the police will not arrest these pro-life activists because their conduct is lawful. For that reason, abortion providers have increasingly sought injunctions against pro-life picketers as a way of limiting protests.

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[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus Life Legal Defense Foundation made any monetary contribution to its preparation. Written consent of the parties to the filing of amicus briefs have been filed with the clerk.

Unfortunately, in many cases, limitations on their First Amendment rights are not all that pro-life activists have to fear in actions for injunctive relief. Frequently, abortion providers seek attorney fees that may be available either under statutes such as RICO (18 U.S.C. § 1964) and FACE (18 U.S.C. § 248), or pursuant to state private attorney general statutes, such as California Code of Civil Procedure § 1021.5. See, e.g., *Feminist Women's Health Center v. Blythe*, 32 Cal. App. 4th 1641 (1995), cert. denied 516 U.S. 987 (upholding award of attorney fees to clinic against pro-life picketers); *Planned Parenthood Association of Santa Barbara, Ventura, and San Luis Obispo Counties v. Aakhus*, 14 Cal. App. 4th 162 (1993) (same). These provisions chill pro-lifers not only in their expressive activities, but in their defense of those activities in the courts.

Amicus LLDF is very concerned about the abuse of injunctive relief both as an end (chilling or stifling free speech rights) and a means (to attorney fees.) The Seventh Circuit's mandate directing the district court to determine whether four unspecified acts or threats of violence committed over a dozen years ago "are sufficient" to support an injunction, and prevailing party status for respondents, is just the sort of misguided approach to injunctive relief that has made the courts into the enemy, rather than the guardian, of free speech rights.

Summary of Argument

The Seventh Circuit's mandate makes one thing perfectly clear: the court is determined to give respondents one more chance to achieve some measure of victory in this litigation. In pursuit of this goal, the court not only engaged in a tortuous reading of the Hobbs Act, 18 U.S.C. § 1951, as discussed at length in the parties' brief, but also has issued mandates that defy both logic and law. The Seventh Circuit has remanded the case to the district court for a backwards

exercise of its equity jurisdiction, governed by conflicting commands, that can only result in an impermissibly vague injunction.

I. The Mandate of the Seventh Circuit Is Nonsensical

In remanding this matter to the district court, the Seventh Circuit was quite explicit in its instructions as to the order in which the court is to address the remaining issues: the district court is *first* to determine whether the four unspecified acts or threats of violence found by the jury are sufficient to support some form of injunctive relief. Then, "[i]f and only if the district court concludes that some form of injunctive relief would be justified based on the four remaining acts found by the jury, that court will have to confront a more complex legal issue, namely, whether the acts or threats of violence language in the Hobbs Act may serve as an independent predicate act under RICO." OR Pet. App. at 8a.[2]

This approach is topsy-turvy. It is as if a case were remanded first to determine what sentence the defendant should receive and then to determine if a crime has been committed, or first to determine if the plaintiff should recover damages and then to determine if the elements of the tort had been proved.

Particularly in the context of injunctive relief under RICO, this approach is nonsensical. Assuming *arguendo* that injunctive relief under RICO is available to private litigants, the equity jurisdiction afforded to district courts under RICO is nonetheless limited by an express statement of purpose: "to prevent and restrain violations of section 1962." 18 U.S.C. § 1964(a). Section 1962 prohibits conduct otherwise not criminal in and of itself, e.g., the investment of income derived from racketeering activity for the purpose of acquiring an interest in, establishing, or operat-

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[2] All citations to the Petition Appendix (OR Pet. App.) are to the pertinent documents in No. 04-1352.

ing any enterprise (18 U.S.C. § 1962(a)), the acquisition of an interest in or control of an enterprise through a pattern of racketeering activity (18 U.S.C. § 1962(b)); the conduct of an enterprise's affairs through a pattern of racketeering activity (18 U.S.C. § 1962(c)); or the conspiracy to violate any of the foregoing provisions (18 U.S.C. § 1962(d)). The commission of miscellaneous crimes—even the predicate offenses that may give rise to a "pattern of racketeering activity"—is not prohibited by RICO since these offenses are crimes in themselves.

Hence, a district court's authority to issue injunctive relief under RICO is limited to the prevention of RICO violations, i.e., violations of section 1962.[3] Injunctive relief is not authorized under RICO merely to prevent the commission of predicate offenses, particularly predicate offenses that are crimes punishable under state law. Thus the examples Congress expressly delineated in section 1964(a) as appropriate injunctions under RICO include:

> ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

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[3] See, e.g., *U.S. v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc.*, 995 F.2d 375 (2d Cir. 1993) (enjoining defendant from participating directly or indirectly in carting industry and associating with co-defendants or known members and associates of organized crime for any commercial purpose was within scope of RICO's civil remedies.); *U.S. v. Local 30, United Slate, Tile and Composition Roofers*, 871 F.2d 401 (3d Cir. 1989), cert. denied, 493 U.S. 953 (1990) (individual defendants enjoined from participating in union's affairs and continuing to be employed in construction industry within union's jurisdiction).

In contrast to these explicit proscriptions on activities directly related to operating a racketeering enterprise, the Seventh Circuit seems to envision the district court conducting an inquiry into whether four unspecified acts or threats of violence could justify "some form of injunctive relief," unmoored from any specific statutory authority for the exercise of its equity jurisdiction. Only after it has determined if "some form of injunctive relief" is justified, need the district court determine if it can squeeze the injunction into the RICO box by finding the acts to be RICO predicates.

In sum, the Seventh Circuit's mandate directs the lower court to consider entering an injunction that exceeds its jurisdiction.

II. The Mandate of the Seventh Circuit Is Contradictory

In its original mandate of February 26, 2004, the Seventh Circuit remanded the case to the district court to determine whether the four unspecified acts or threats of violence "are sufficient to support *the nationwide injunction it imposed.*" OR Pet. App. at 30a (emphasis added). This limitation was reinforced where the court noted that the district court "may conclude that the proper interpretation of § 1951(a) is immaterial, if it decides that the four acts or threats of physical violence found by the jury are not sufficient alone to support *the nationwide injunction.*" OR Pet. App. at 31a (emphasis added).

However, in its order of January 28, 2005, after further briefing by petitioners showed the unlikelihood of the four acts supporting the nationwide injunction, the Seventh Circuit *sub silentio* altered its mandate, holding, "The only remaining question, to repeat, is *whether a different injunction*, tailored to the violations found, would be appropriate." OR Pet. App. at 7a. But later in the same opinion, it seemed to allow for either the same *or* a different injunction: "The

only remaining question is whether *any injunction* is appropriate. . . ." OR Pet. App. at 17a (emphasis added).

The Seventh Circuit is also unclear as to the scope of the district court's inquiry. In elaborating on how the district court is to determine the necessity of injunctive relief, the Seventh Circuit admonished: "This is not, however, an invitation either to the court or to the parties to reopen the record. If there is anything at all that is to be done, it must be based on the record that has already been built." OR Pet. App. at 7a–8a.

However, in discussing the same issue in the concluding paragraph, the Seventh Circuit notes that the Freedom of Access to Clinic Entrances Act "has now been in effect for five more years since the district court first considered the necessity of a nationwide injunction, and experience may require a reassessment of the Act's impact." OR Pet. App. at 16a. The Seventh Circuit's musing about more recent "experience" is, in fact, "an invitation . . . to reopen the record." How can the court reassess the experience with the Act's impact if not by engaging in another round of evidentiary hearings?

The conflicting directions given to the district court reveal the Seventh Circuit's own failure to grasp what it wants the lower court to do, other than give the respondents one more chance.

III. Any Injunction Issued Pursuant to the Seventh Circuit's Mandate Would Be Impermissibly Broad and Imprecise

In directing the district court to determine whether injunctive relief is appropriate, the Seventh Circuit noted, "It is not even clear whether the acts of violence were sufficiently well defined to justify any injunctive relief." OR Pet. App. at 7a.

To call this an understatement is itself an understatement.

Over the course of a seven-week trial, involving dozens of witnesses and hundreds of exhibits, Respondents argued that Petitioners and "hundreds or thousands of co-conspirators"[4] were responsible for dozens of acts or threats of violence, along with hundreds of other alleged criminal acts. These alleged acts or threats of violence ranged from kicking cars to making threats on radio programs to destroying medical equipment to shoving patients or clinic employees to leaving statements on a hotline number to entering a clinic and making remarks about "casing the place."

Out of this morass of evidence, the jury found that some defendant(s), or some person(s) associated with defendant PLAN, had committed four "acts or threats of physical violence to person or property." OR Pet. App. at 143a. No further specification of those acts is available to the district court.

Because the district court has no way of knowing which particular acts or threats the jury found, much less who committed them or where or when, any injunction to "redress" these acts could only be couched in the most general terms. Indeed, as all the court knows is that these were acts or threats of physical violence to persons or property in the context of this proceeding, the most narrowly tailored injunction it could impose would prohibit the petitioners from committing acts or threats of violence against the persons or property of respondents or their employees or clients.[5]

Such an injunction would clearly not comply with Federal Rule of Civil Procedure 65, which requires that every

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[4] Plaintiff's Amended RICO Case Statement, S. App. 378, 381.

[5] Indeed, this is how the district court dealt with the unspecified acts or threats of violence in its order of July 6, 1999, imposing a nationwide injunction. That order prohibits "damaging, destroying, or stealing property of" or "using violence or threat of violence against" any Plaintiff Clinic or any of its employees, volunteers, or clients. OR Pet. App. at 93a. In effect, the district court simply divided violence against property and violence against persons into two different provisions.

injunction "be specific in its terms" and "describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Rather than being specific, an injunction against acts or threats of violence is more akin to the cry of an exasperated parent: "Whatever you kids are doing out there, cut it out!" While such an admonition may be effective in certain contexts, it hardly satisfies the requirements of due process, particularly given the wide array of conduct and speech that respondents claim constitutes acts or threats of violence.

Such a vague injunction, particularly the provision concerning "threats" of violence, would also be a powerful weapon in respondents' hand to chill the petitioners' advocacy. It would effectively turn over prosecution of petitioners for a vast array of criminal statutes to private parties—private parties ideologically opposed to respondents who will have every incentive to threaten or bring contempt proceedings for claimed violations.

Conclusion

There is a reason the Seventh Circuit's mandate is so illogical and far-fetched. It can be summed up in two words: attorney fees. The reality of the court's mandate is that it has nothing to do with injunctive relief for the respondents. No one would seriously contend that the respondents will sleep more soundly if the district court enjoins Joe Scheidler and Tim Murphy and Andrew Scholberg from committing acts of violence against them, i.e., acts already stringently punishable as crimes.

In truth, the "relief" sought by the respondents, which the Seventh Circuit is loathe to deny them, is simply prevailing party status, and with that, the right to collect millions of dollars in attorney fees. For the sake of giving respondents one last (?) chance at an award of fees, the

Seventh Circuit has defied this Court's mandate putting an end to this litigation.

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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